Comment on Recent Cases

ANIMALS: MEASURE OF DAMAGES FOR LOSS OF DOG.—An indication that the spirit of commercialism has not yet invaded the bench and that at times law tinged with sentiment makes justice, can be read in Judge McNary's opinion in *McCallister v. Sappinfield,*[1] on the criterion of value of a Scotch collie dog. The dog in question was well trained; in his master's words, "I could send him after a band of goats, half a mile, and he would round them up and bring them in, and the same with driving cattle", and "he was more useful to me than a span of horses." Another phase of his character was shown by these words, "She [plaintiff's wife] wasn't afraid to stay because the dog was a protector to her." This evidence was objected to by the defendant who killed the dog, as not being confined to its market value, being rather a recital of its traits, habits and intelligence. He asked that the damages be set at the market value. Whether other considerations such as usefulness, fidelity, affection and pedigree were to influence the damages was the question for the court.

There is still some doubt on the exact status of the dog. This is odd when one considers his intimate relationship with man, and that, as Cuvier[2] says, "the dog was perhaps necessary to the establishment of civil society, and a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog."[3] Going back to the beginnings of history we find that the ancients ate puppies as a delicacy and offered them in sacrifice to their Gods. The dog was a part of the agricultural establishment of the Romans and was treated as such. There were the *canes villatici,* to guard the villa of the Roman senator, the *canes venatici,* accompanying him on his hunting expeditions, and the *canes pastorales* by whom his flocks were guarded. Virgil in his Georgics has given directions as to their management and education.

Blackstone[4] among others is responsible for the dog's dubious standing in the English community, defining him as one of those animals that do not serve for food and which therefore the law holds to have no intrinsic value. He adds, that "though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that

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[1] (Ore., Sept. 22, 1914), 144 Pac. 432.
[2] Cuvier, "Animal Kingdom".
[3] 7 Edinburgh Enc. 646.
[4] 4 Blackstone Commentaries 235.

the crime of stealing of them amounts to larceny." So they are branded as *ferae naturae* and utterly worthless.

Meantime the dog has risen in the estimation of the law so that today he is said to be subject to ownership.[5] Trespass will lie for an injury to him. Trover is maintainable for his conversion.[6] Replevin will restore him to the possession of his master.[7] He may be bought and sold and an action will lie for his price. He is now the subject of larceny in most states.[8] In fact, he has been held property under the due process clause of the constitution.[9]

It is only necessary to mention in passing, the high place in man's affection the dog has always held, that poets have been glad to sing his praise, as witness Sir Thomas More's, "Whosoever loveth me loveth my hound", and that other verse "There is no dog so sad, but he will wag his tail." That the dog has a place in politics is familiar to all who remember the campaign song of 1912, "You've got to quit kickin' my dog aroun'." Taking all this into consideration the court rightly held that the owner of a dog is not circumscribed in his proof to its market value.[10] The peculiar facts of each case must be taken into consideration by the jury. If it is competent to show pedigree and different strains of blood upon the question of value of horses and cattle and even sheep and swine, surely the same can come into discussion here, for there are high and low degrees among dogs as well as men. Judge Wilkes, that eminent authority on and lover of dogs, speaking on the registration books of pedigrees, says,[11] "These are shown to be received as satisfactory evidence of pedigree in the same manner and upon the same idea as entries in family records of births, deaths and marriages are received with regard to the human family. It is true that in family records the entries in the books are usually made by the relatives and friends of the person, but, inasmuch as dogs have no relatives competent to make entries for them, it is allowable

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[5] Hurley v. State (1891), 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

[6] Mullaly v. People (1881), 86 N. Y. 365.

[7] Lynn v. State (1894), 33 Tex. Crim. Rep. 153, 25 S. W. 779.

[8] Johnson v. McConnell (1889), 80 Cal. 545, 22 Pac. 219. From 1873 to 1887 the value of a dog as the subject of larceny was one dollar, but since that time his value is to be estimated in the same manner as other property. Cal. Pen. Code, § 491.

[9] Jenkins v. Ballantyne (1892), 8 Utah 245, 16 L. R. A. 689, 30 Pac. 760.

[10] Sedgwick on Damages, 9th ed., §§ 251, 251A; Heiligmann v. Rose (1891), 81 Tex. 222, 26 Am. St. Rep. 804; Spray v. Ammerman (1872), 66 Ill. 309; Uhlein v. Cromack (1872), 109 Mass. 273; Hodges v. Causey (1900), 77 Miss. 353, 26 So. 945, 48 L. R. A. 95, 78 Am. St. Rep. 525.

[11] Citizen's Rapid Transit Co. v. Dew (1898), 100 Tenn. 317, 45 S. W. 290, 40 L. R. A. 518, 66 Am. St. Rep. 745.

for such entries to be made by the owners, friends and admirers of the dog."

To quote the court's own language, "To assist in the proper determination of the value of dogs experts may be allowed to give their opinions, ... evidence of a dog's pedigree, and of the qualifications and performances of his ancestors is competent, as well as testimony relative to his own peculiar characteristics and qualities."[12]

The admission of such evidence is merely an application of the general rule of damages exemplified in actions for the loss of family portraits and works of art that cannot be replaced. That damages should not be given for the *pretium affectionis* can be grasped by the legal mind, but were Kipling a judge he would have ruled otherwise, as witness, "but a dog with whom one lives alone for at least six months in the year; a free thing, tied to you so strictly by love that without you he will not stir or exercise; a patient, temperate, humorous, wise soul, who knows your moods before you know them yourself, is not a dog under any ruling."

But as the courts offer no pecuniary balm for the anguish caused by the dog's demise,

"So why in Heaven (before we are there!)
Should we give our hearts to a dog to tear."

L. G.

CONFLICT OF LAWS: GUARDIAN'S BOND: ACTION UPON IN FOREIGN JURISDICTION.—The case of *Hays v. King*[1] decides that a surety on a guardianship bond, executed in Arkansas pursuant to the laws of that state, may, upon his removal to Oklahoma, be sued in the courts of the latter state for a breach of the bond, the action being transitory in its nature. The laws of the two states for the enforcement of the liability were substantially the same[2] and consequently the court was not "called upon to enforce, or to put into active operation, the statutes of Arkansas". The rule has been applied to administrator's bonds,[3] bail bonds,[4] actions *ex delicto* founded on tort,[5] stockholder's liability,[6] right of recovery under a

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[12] Quoting from 1 R. C. L. 1130.

[1] (Oct. 27, 1914), 143 Pac. 1142.

[2] Wooden v. Western N. Y. & P. R. Co. (1891), 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.

[3] Johnson v. Jackson (1876), 56 Ga. 326; Cutrer v. State of Tennessee (1911), 98 Miss. 841, 54 So. 434, commenting adversely upon ruling in Judge of Probate etc. v. Hibbard (1872), 44 Vt. 597, 8 Am. Rep. 396.

[4] Otis v. Wakeman (N. Y., 1841), 1 Hill 604, dictum.

[5] Burns v. Grand Rapids etc. R. Co. (1888), 113 Ind. 169, 15 N. E. 230; Leonard v. Columbia Steam Nav. Co. (1881), 84 N. Y. 48, 38 Am. Rep. 491.

[6] Rhodes v. United States Nat'l Bank (1895), 24 U. S. App. 607, 34 L. R. A. 742 and note thereto. Contra, Marshall v. Sherman (1895), 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757.